No. 417

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

DISTRICT OF COLUMBIA, *Petitioner*,

v.

CLIFFORD G. BECKHAM, MABEL V. BECKHAM, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

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DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the District of Columbia, respectfully shows and represents unto your Honors that:

STATEMENT OF THE MATTER INVOLVED

In *District of Columbia* v. *Murphy* and *District of Columbia* v. *DeHart*, 314 U. S. 441, 86 L. Ed. 329, 62 S. Ct. 303, hereinafter referred to as the *Murphy* case, this Honorable Court had before it the question whether two employees of the Federal Government were domiciled within the District of Columbia

within the meaning of Sec. 2(a) of the District of Columbia Income Tax Act, *infra*. In the *Murphy* case this Court, although pointing out that it did not suggest a formula to handle all domicile cases that may arise, nevertheless set forth various relevant indicia of domicile.

The District of Columbia Income Tax Act, *infra*, imposes a tax upon the taxable income of every individual domiciled in the District of Columbia on the last day of the taxable year. The respondents, in July 1944, paid income taxes to the District of Columbia for the calendar year 1940 and, in February 1946, filed a claim for refund thereof on the ground that they were domiciled in Fort Worth, Texas, on December 31, 1940. The claim was denied by the Assessor of the District and respondents seasonably filed an appeal from such denial to the Board of Tax Appeals for the District of Columbia (R. 4, 7). The Board of Tax Appeals found as a fact that respondents were domiciled in the District of Columbia on December 31, 1940, concluded as a matter of law that they were liable for the taxes involved, and affirmed the action of the Assessor in disallowing their claim for refund of such taxes (R. 7, 9). In deciding this case the Board of Tax Appeals relied upon the *Murphy* case (R. 8).

The respondent Clifford G. Beckham, on the tax date involved and for many years prior thereto, was an employee of the Federal Government.

The respondents petitioned the United States Court of Appeals for the District of Columbia for a review of the decision of the Board of Tax Appeals. On September 15, 1947, the Court of Appeals reversed the decision of the Board of Tax Appeals (R. 30). Pending review of this case the Court of Appeals decided *Collier* v. *District of Columbia* (R. 25), 161 F. 2d 649, and therein stated that the relevant indicia of domicile prescribed in the *Murphy* case are not to be used in cases falling within two broad rules stated in the *Murphy* case. On oral argument of the present case before the Court of Ap-

peals counsel for petitioner (District of Columbia) contended that the *Collier* case was wrongly decided and urged reversal or modification thereof but the Court found no reason to do so (R. 25, 26).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered September 15, 1947 (R. 30). The jurisdiction of this Court to issue the writ applied for is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938, c. 229; U. S. Code, 1940 Ed., Title 28, Sec. 347(a)).

QUESTIONS PRESENTED

1. Whether the domicile of a Federal employee is to be determined by consideration of all relevant facts and statements made by the employee rather than upon a broad rule which excludes relevant indicia of domicile.

2. Whether a Federal employee's intention to return to the State whence he came to the District of Columbia should be determined not only from his present self-serving declarations but also from examination into his intentions as to the future.

3. Whether the intention of a Federal employee to return to the place whence he came is fixed and definite when it is conditioned upon future contingencies.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The United States Court of Appeals for the District of Columbia has not given proper effect to the decision of this Court in the *Murphy* case.

2. The Court of Appeals has decided an important question of local law in conflict with its prior decisions following the *Murphy* case.

WHEREFORE, Your petitioner prays the allowance of a Writ of Certiorari to the United States Court of Appeals for the District of Columbia in this cause, and that said cause may be reviewed and determined by this Honorable Court, and that the judgment of said Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

DISTRICT OF COLUMBIA,
Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

The opinions of the Board of Tax Appeals for the District of Columbia (R. 8) and the United States Court of Appeals for the District of Columbia (R. 25) are not yet reported.

JURISDICTION

The grounds upon which the jurisdiction of this Court is invoked are stated in the petition.

STATEMENT OF THE CASE

On July 21, 1944, the respondents paid income taxes to the District of Columbia for the calendar year 1940 and, on February 25, 1946, filed a claim for refund thereof on the ground that they were domiciled in Fort Worth, Texas, on December 31, 1940. The claim was denied by the Assessor of the District of Columbia on February 28, 1946, and on March 20, 1946, respondents filed an appeal from such denial to the Board of Tax Appeals for the District of Columbia (R. 3, 4, 7).

The respondents are husband and wife. Respondent Clifford G. Beckham was born in Fort Worth, Texas, in 1881. He was admitted to the Bar of Texas in 1903 and immediately thereafter entered his father's law office in Fort Worth. In 1914 he entered the Federal Government service in Texas as a Special Agent of the Department of Justice, and continued therein until 1919. He resided in Fort Worth the early part of this period and in New Orleans the latter part thereof when his duties called him to that point. In November, 1919, he was appointed Prohibition Director for Texas and returned to Fort Worth, remaining there until 1920, when he went to Austin, Texas. In 1921, upon a change in the National Ad-

ministration, he was requested to resign and did so. He then practiced law in Austin, Texas, until 1924 and in Fort Worth until 1928. His practice was not successful. In 1928 he was appointed Special Agent in the office of the General Counsel for the Commissioner of Internal Revenue, which position he still holds. Upon being appointed to the office of the General Counsel for the Commissioner of Internal Revenue he came to the District of Columbia with his wife, respondent Mabel V. Beckham, and they have resided together in the District of Columbia ever since. He paid poll tax in Texas in 1940; he has not paid since then because under the Texas law he was entitled to exemption on account of his age. His wife paid poll taxes in Texas in 1941, 1943 and 1944. (R. 5, 6.)

Respondents have lived in a rented apartment in the District (R. 11). Respondents own two lots outside of Fort Worth, Texas, worth about $200 each. These lots are all that remain of a larger piece of property, the balance of which has been sold (R. 6). They also own a cemetery lot in Texas (R. 11). They do not own any real estate in the District (R. 11). Both respondents have voted in Texas in every general election with one exception (R. 6).

Beckham has not paid any intangible personal property tax to the State of Texas since 1928 (R. 16). There has never been any income tax law in the State of Texas (R. 10). Respondents have paid their Federal income taxes at Dallas, Texas (R. 10). Beckham has retained membership in organizations such as the Shrine, the Blue Lodge, the Consistory and Scottish Rite in Fort Worth (R. 17, 18).

Beckham has never returned to Texas since coming to Washington in 1928 (R. 7, 16). From 1928 to the date of the hearing in this case Beckham was in ignorance of whether he continued to own his residence at 2541 Greene Avenue in Fort Worth, for the sale or rent of which he had given a power of attorney to a representative there (R. 15). Beckham has never received any rent for the aforesaid property, nor re-

ported any income from such property in his income tax returns (R. 15, 16).

In 1939 and 1940 Beckham had bank accounts in the District but did not have any bank accounts in the State of Texas (R. 6, 16). Although petitioners have no church, lodge or civic affiliation in the District, they occasionally attend churches in the District and make small contributions to such churches (R. 17, 18). Their only church membership is in the First Church of Christ, Scientist, in Boston, Massachusetts (R. 17, 18).

Beckham contributed to charities in the District but has not contributed to any charities in the State of Texas from 1928 through the year 1940. He does not make any donations to any churches in Texas (R. 18). Respondents have two daughters. One is married and living in Chevy Chase, Maryland, in a home owned by her and her husband. The married daughter was married in 1932 and lived at various apartments in Washington until the home in Chevy Chase was obtained. The unmarried daughter is in business in Baltimore where she conducts a dancing studio with her partner. She "generally returns at the end of the week" to be with respondents (R. 18, 19).

Beckham is eligible for retirement from Government service but has not retired because his retirement pay would not be sufficient to live on. He expects to remain in Government service until 1957 at which time he will be seventy-six years of age. If he were to be forcibly retired at seventy and were offered another position in the District at the same salary he is receiving now he would accept it (Finding 5, R. 6, 7, 20).

Beckham was invited to return to Fort Worth and practice law there within the past few years but he did not do so. He did not return to Fort Worth between 1928 and 1940 because in the course of his work he reached the conclusion that he could not earn as much in the practice of law as by retaining a position in the Government service (Finding 6, R. 7, 22).

The Board of Tax Appeals found as a fact that respondents were domiciled in the District of Columbia on December 31, 1940, concluded as a matter of law that they were liable for the taxes involved, and affirmed the action of the Assessor in disallowing their claim for refund of such taxes (R. 7, 9).

The Court of Appeals, by a divided court, reversed the findings of the Board that respondents were domiciled in the District of Columbia on December 31, 1940, and held that conditional answers to hypothetical questions concerning Beckham's intention to return to Fort Worth or remain in the District constituted no substantial evidence that the Beckhams have not had during the period of their residence in the District a fixed intention to return to their previous abode in Texas at the end of Mr. Beckham's Government service (R. 25-29).

SPECIFICATION OF ERRORS

The United States Court of Appeals for the District of Columbia erred:

(1) In reaffirming its decision in *Collier* v. *District of Columbia, supra,* in which the Court held that various relevant indicia of domicile prescribed in the *Murphy* case are not to be used in determining whether any case of a Federal employee falls within a broad rule stated in the *Murphy* decision.

(2) In holding that conditional answers to questions as to Beckham's future intentions constituted no substantial evidence with respect to the question whether respondents had or had not maintained a fixed intention to return to their previous abode in Texas at the end of Mr. Beckham's Government service.

(3) In not affirming the decision of the Board of Tax Appeals holding that respondents were domiciled in the District of Columbia on December 31, 1940.

STATUTE INVOLVED

Sec. 2(a) of the District of Columbia Income Tax Act, 53 Stat. 1087, c. 367 (Title 47, Sec. 1502(a), D. C. Code, 1940), provides in material part as follows:

> "TAX ON INDIVIDUALS. — There is hereby levied for each taxable year upon the taxable income of every individual domiciled in the District of Columbia on the last day of the taxable year a tax at the following rates: * * *"

SUMMARY OF ARGUMENT

The Murphy case placed the burden of proof upon the taxpayer to establish domicile outside the District of Columbia if he is to escape income tax liability; and he must do so according to established modes of proof of where a man's home is. The broad rules stated in the Murphy case are conclusions to be reached only after all relevant indicia of domicile have been proved and applied; they are not primary tests to be used to the exclusion of such indicia. The Court of Appeals has not followed the Murphy case in deciding the present case and reaffirming the Collier case.

Prior to deciding the present case and the Collier case, which was decided while the present case was pending, the Court of Appeals had followed the Murphy case. The present case and the Collier case are in conflict with the Court's prior decisions. It is extremely important to proper administration of the District's tax laws and protection of the District's revenues that the decision of the Court of Appeals in the present case be reversed.

ARGUMENT

I

The Court of Appeals has not given proper effect to an applicable decision of this Court.

In *District of Columbia* v. *Murphy* and *District of Columbia* v. *DeHart*, 314 U. S. 441, 86 L. Ed. 329, 62 S. Ct. 303, herein-

after referred to as the *Murphy* case, this Honorable Court had before it the question whether two employees of the Federal Government were domiciled in the District of Columbia within the meaning of Sec. 2(a) of the District of Columbia Income Tax Act, *supra*. Although this Court did not decide whether the respondents in the *Murphy* case were domiciled in the District of Columbia on the tax date involved,[1] this Court stated certain broad rules relating to domicile and set forth various relevant indicia of domicile.

The case of *Collier* v. *District of Columbia*, 161 F. 2d 649, decided by the United States Court of Appeals for the District of Columbia on May 5, 1947, and the present (Beckham) case involved the liability of two employees of the Federal Government for individual District income tax, as did the *Murphy* case. The same statute is involved.

In the *Collier* case the Court of Appeals quoted the broad rules referred to by this Court in the *Murphy* case and a footnote applicable thereto (161 F. 2d 650, 651) and said:

> "The remainder of the opinion of the Court, which followed the foregoing quotations, pointed to various relevant indicia of domicile. *But as we read the quotations, these indicia are not to be used in cases falling clearly within the two broad rules first stated.* The opinion specifically says so in the opening clause of the third paragraph above quoted.
>
> "We think that the present case falls clearly within the first broad rule stated in the *Murphy* case, *supra*. * * * " (Emphasis supplied.)

The first broad rule quoted and referred to by the Court of Appeals is that "a man does not acquire a domicile in the

[1] The cases were reversed and remanded to the Board of Tax Appeals for further proceedings, whereupon the Board determined that Murphy and DeHart were domiciled in the District of Columbia. The findings of fact and opinions of the Board can be found in Prentice-Hall State and Local Tax Service (D. C.), pars. 13,023 and 13,024.

District simply by coming here to live for an indefinite period of time while in the Government service." The third paragraph which convinced the Court of Appeals that this Court, in the *Murphy* case, specifically precluded use of the indicia of domicile prescribed in that case reads as follows (161 F. 2d 651; 314 U. S. 455):

> "Cases falling clearly within such broad rules aside, the question of domicile is a difficult one of fact to be settled only by a realistic and conscientious review of the many relevant (and frequently conflicting) *indicia* of where a man's home is and according to the established modes of proof."

As counsel for petitioner read the paragraph quoted above, with due respect to the Court of Appeals, this Court set the broad rules to one side and said that, regardless of such rules, a taxpayer's domicile must be determined by the relevant indicia of where a man's home is according to the established modes of proof. This Court in the *Murphy* case was considering the District income tax liability of two Federal employees, based on their domiciles, and throughout its enumeration of relevant indicia of domicile are interwoven references to Federal employees. In that case this Honorable Court placed the burden of proof upon the taxpayer to establish domicile outside the District if he is to escape the tax and pointed out (314 U. S. 455) that:

> "* * * A decision that the statute lays a tax only on those with an affirmative intent to remain here the rest of their days would be at odds with the prevailing concept of domicile, and would give the statute scope far narrower than Congress must have intended."

The present (Beckham) case was pending review by the Court of Appeals when the *Collier* case was decided (R. 25).

On oral argument in that Court counsel for the District took the position that the *Collier* case was wrongly decided and urged the Court to reverse or modify the decision.[2] However, in deciding this case, Mr. Justice Clark, speaking for the Court, said (R. 26):

> "We have reexamined the *Collier* decision. We find no warrant in reason or authority for reversal or modification thereof."

In deciding the present case the Court referred to the "fixed intention" to return to a former place of abode that was controlling in the *Collier* case and said (R. 27):

> "* * * Any honest witness—and no question of the veracity of the Beckhams is here raised—testifying to a fixed intention to return to a former abode at the end of Government service would be bound to admit, if questioned, that he *might* remain in the District if at some future time it was made substantially to his advantage to do so; or that if he were to reach an advanced age before his Government service ended, he might not depart. * * *"

This Court, referring to what constitutes retention of domicile at a former place of abode, pointed out in footnote 9 in the *Murphy* case [3] that while *the intention to return must be fixed*, the date need not be; and while the *intention to return must be unconditional*, the time may be contingent. The Court of Appeals thought that conditional answers to hypothetical questions asked of Beckham regarding his intentions constituted no substantial evidence that the Beckhams have not had

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[2] A petition for rehearing before the full Court or, in the alternative, for modification of the opinion had been filed in the *Collier* case (No. 9465 in the United States Court of Appeals for the District of Columbia) on May 12, 1947, and was pending when the Beckham case was argued on June 3, 1947. The petition was denied June 5, 1947.

[3] 314 U. S. 455.

a fixed intention to return to their previous abode in Texas at the end of Government service, and that such questions and answers were insufficient to bar a former domicile in the face of uncontradicted testimony of a fixed intent to return. It is respectfully submitted that the testimony referred to and quoted by the Court, as well as other testimony of like tenor (R. 11, 19, 20, 22) was not only substantial evidence but highly pertinent and material in determining what Beckham "left behind, and his own attitudes," [4] with respect to his former Texas abode. Whether a person, Government employee or not, has a fixed and definite intention to return to a former place of abode and take up his home there fundamentally and essentially embraces deliberate consideration of future plans. This Honorable Court clearly pointed the way in this respect when it said in the *Murphy* case: [5]

> "In order to retain his former domicile, one who comes to the District to enter Government service must *always* have a *fixed* and *definite* intent to return and take up his home there when separated from the service. A mere sentimental attachment will not hold the old domicile. *And residence in the District with a nearly equal readiness to go back where one came from, or to any other community offering advantages upon the termination of service, is not enough.*
>
> "One's testimony with regard to his intention is, of course, to be given full and fair consideration, but is subject to the infirmity of any self-serving declaration, and may frequently lack persuasiveness *or even be contradicted or negatived by other declarations and inconsistent acts.*" (Emphasis supplied.)

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[4] Id.
[5] 314 U. S. 456.

It is of course to be expected that any witness who testifies under oath, particularly an attorney, will endeavor to tell the truth. Beckham's testimony, if true, clearly established that he does not have a fixed and definite intention to return to Texas. Mr. Justice Edgerton, in his dissenting opinion, clearly pointed this out when he said (R. 28):

> "I think the Board was right. Clifford G. Beckham himself testified in effect that his intent to return to Texas was not fixed and definite, but conditional, as I understand those terms. He said: 'If they force me out [of government service] at 70, I will go back [to Texas]. At 76, I do not know.' He said that though he were forced to retire before he was 76, he might take another position here if he were offered one at a salary sufficiently better than his probable earnings in Texas. *According to his own testimony,* therefore, *his intent to return to Texas was conditional* on (1) the age at which he might be separated from the government service and (2) the comparative employment opportunities here and in Texas that he might then find. This testimony was not contradicted." (Emphasis supplied.)

Mr. Justice Edgerton's opinion has more than ample support in the record. The petitioners have not returned to Texas since they came to the District in 1928. Mr. Beckham has not even been interested in what has become of his home in Fort Worth. He has been invited to return to Fort Worth and practice law there within the past few years but he did not do so. His daughters are firmly established near Baltimore and Washington rather than in Texas. Many other facts shown in the Statement of the Case, including those particularly referred to by Justice Edgerton and petitioners' failure

to pay intangible personal property taxes in Texas,[6] plainly indicate that the petitioners have completely divorced themselves from the State of Texas and established their permanent home in the District.

It is respectfully submitted that the Court of Appeals, by its decisions in the *Collier* case and this case, has not properly construed the *Murphy* case and has not followed its pronouncements.

II

The decision is in conflict with prior decisions of the Court of Appeals which followed the Murphy case.

In deciding the *Collier* case and the present case the Board of Tax Appeals relied on the *Murphy* case.[7] In the last paragraph of the *Collier* case [8] the Court of Appeals said:

> "The District of Columbia cites *Rogers* v. *Rogers*.[9] But in that case the matter of Government employ was not involved and there was ample evidence of an intention to remain in the District."

In *Beedy* v. *District of Columbia*, 75 U. S. App. D. C. 289, 126 F. 2d 647, cited by Justice Edgerton in his dissenting opinion (R. 28), which was written by the Chief Justice of the Court of Appeals, the Court implicitly followed the *Murphy* case and applied the relevant indicia of domicile re-

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[6] The laws of Texas before and since 1928, when petitioners came to the District, imposed taxes upon intangible personal property of residents of the State. Vol. 20, Vernon's Revised Civil Statutes of the State of Texas (1939 ed.), Articles 7145, 7147, 7152. The situs of intangible personalty for purposes of taxation in Texas is the domicile of the owner. *Texas Land & Cattle Co.* v. *City of Fort Worth*, 73 S. W. 2d 860, 862, appeal dismissed 295 U. S. 716; *First Trust Joint Stock Land Bank of Chicago* v. *City of Dallas*, 167 S. W. 2d 783, 785.

[7] Par. 14-001, pp. 1602, 1603, The Corporation Tax Service, D. C., published by Commerce Clearing House, Inc.; R. 8.

[8] 161 F. 2d 651.

[9] 1942, 76 U. S. App. D. C. 297, 130 F. 2d 905.

ferred to in the latter case. The *Beedy* case involved the domicile and District income tax liability of a former member of Congress from the State of Maine who had ended his congressional career and remained in the District to practice law for a limited time only. The Chief Justice, referring to the question of domicile as between Federal employees and private employees, concluded that: [10]

> " * * * the problem is not one of principle, but rather of measure of proof. In either case, the question must be answered by the application of certain rules established by the courts, state and federal, to determine where a man's home is."

In *Pace* v. *District of Columbia,* 77 U. S. App. D. C. 332, 135 F. 2d 249, affirmed 320 U. S. 698, 88 L. Ed. 408, 64 S. Ct. 406, which also involved the domicile of a Federal employee and District inheritance tax liability upon the transfer of certain jointly owned bank deposits of the decedent, the Court of Appeals said that the *Murphy* case did no more than shift to the individual quartered in the District the burden of proof to establish domicile elsewhere, and that the traditional substantive standards of the domiciliary concept remained unaltered.[11] The Court also said,[12] after reference to the *Murphy* case and a discussion of the reasons why a person in Federal service may desire to retain his domicile outside the District, that the onus of demonstrating the *continuing character* of the state domicile has been placed upon the Federal employee, and that "these rules are not appropriate alone to those who come here to enter the Federal service", citing the *Beedy* case.

The case of *Rogers* v. *Rogers, supra,* referred to by the Court of Appeals in the *Collier* case, involved a suit for divorce filed by the wife, who alleged that the defendant was a resident

[10] 75 U. S. App. D. C. 291, 126 F. 2d 649.
[11] 77 U. S. App. D. C. 336, 135 F. 2d 253.
[12] 77 U. S. App. D. C. 334, 135 F. 2d 251.

of the District for more than two years prior thereto. The Court said that "residence" for divorce purposes means "domicile".[13] The Court of Appeals, applying the doctrine of the *Murphy* case, pointed out that the defendant Rogers "by testifying that he meant to remain here so long as he could work and make a living, he negatived a definite intent to return to Kentucky and asserted an intent to live in the District permanently or indefinitely."[14] Beckham, in the present case, has done precisely the same thing to which the Court referred in the quoted language.

In *Shilkert* v. *Helvering*, 78 U. S. App. D. C. 178, 138 F. 2d 925, the Federal income tax liability of a taxpayer was involved. One of the questions before the Court of Appeals was whether petitioner was domiciled in California during the tax years so as to be entitled to report his taxable income on a community tax basis. The Court held that he was not. During the course of the opinion the Court of Appeals referred to the *Murphy* case and said that the ruling of this Honorable Court in that case went no farther than to change the former rule of burden of proof.

It is clear from the foregoing that, prior to the *Collier* case and the present (Beckham) case, the Court of Appeals had the view that the *Murphy* case did not prescribe a separate rule for determining domiciles of Federal employees but that its principles applied to all alike. The Superior Court of Delaware has that view. In *Mitchell* v. *Delaware State Tax Com'r*, 42 A. 2d 19 (1945), that Court had before it the question of income tax liability of a Federal employee who had come to the District to perform Government service. His family home had previously been in Delaware. The Delaware law, like the District law, made liability for the tax dependent upon domicile of the individual within the taxing jurisdiction. Mitchell resisted the tax in both Delaware and the District of Columbia. The Court held that Mitchell was not domiciled

[13] 76 U. S. App. D. C. 297, 130 F. 2d 905.
[14] 76 U. S. App. D. C. 298, 130 F. 2d 906.

in Delaware and therefore not liable for the Delaware tax. In so doing the Court referred to the *Murphy* case and said (42 A. 2d 22):

> "The domicil of a person living in the District of Columbia in the performance of the duties of a position in the civilian service of the government is determinable by general principles."

If the indicia prescribed by this Honorable Court are not to be used in determining the domiciles of Federal employees when, through some unexplained method, they come within the broad rules referred to in the *Collier* case, an anomalous situation is presented. An example of this is the case of *Eleanor B. Patterson* v. *District of Columbia,* decided by the Board of Tax Appeals for the District of Columbia on March 26, 1947,[15] where the petitioner had obtained a divorce in the District in 1941 but claimed domicile in Connecticut since 1934, when she came to the District to enter Federal employment. The petitioner in that case sought to escape District income tax liability. The Board held that petitioner was domiciled in the District and liable for the tax since residence in the District for divorce purposes means "domicile". *Rogers* v. *Rogers, supra.*

The *Mitchell* and *Patterson* cases, discussed above, exemplify the conflict of the *Collier* and *Beckham* decisions with prior decisions of the Court of Appeals and the very difficult problem faced by the District Government in attempting to properly administer the District tax laws and protect the District's revenues if the decision in this case becomes final by denial of the District's petition for certiorari.

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[15] Par. 14-001, p. 1605-3, The Corporation Tax Service, D. C., published by Commerce Clearing House, Inc.

CONCLUSION

The *Murphy* case is a very important authority on the subject of domicile. It has been cited and relied upon by this Honorable Court in cases involving District inheritance taxes,[16] state personal property taxes,[17] and state convictions for bigamy.[18] The United States Court of Appeals for the District of Columbia has applied the principles of the *Murphy* case in various cases as herein pointed out. The Municipal Court of Appeals for the District of Columbia has done the same.[19] The various other Federal and state courts, likewise, have relied on the *Murphy* case in many legal controversies affecting the rights and responsibilities of individuals with respect to estate taxes,[20] *quo warranto* proceedings,[21] divorce,[22] income taxes,[23] civil damages,[24] alimony,[25] and others.

The decision of the Court of Appeals in the present case which has reaffirmed the *Collier* case places the officials of the District of Columbia who are charged with administration of the tax laws and collection of the District's revenues in a position whereby it is impossible to perform their official duties in reliance upon the principles and criteria laid down in the *Murphy* case. The situation has not been remedied by the domiciliary provisions of the District of Columbia Income and Franchise Tax Act of 1947.[26] On the contrary, the District's

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[16] *District of Columbia* v. *Pace*, 320 U. S. 698, 700.
[17] *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 296.
[18] *Williams* v. *North Carolina*, 325 U. S. 226, 231; *Williams* v. *North Carolina*, 317 U. S. 287, 298.
[19] *Jemison* v. *Metropolitan Life Ins. Co.*, 32 A. 2d 704, 705; *D'Elia & Marks Co.* v. *Lyon*, 31 A. 2d 647, 648.
[20] *In re Walter's Estate*, 48 N. Y. S. 2d 952, 955; *In re Daly's Estate*, 178 Misc. 943, 36 N. Y. S. 2d 954, 960.
[21] *State* v. *Wiley*, 349 Mo. 239, 160 S. W. 2d 677, 686.
[22] *Dalton* v. *Dalton*, 270 App. Div. 269, 59 N. Y. S. 2d 68, 71.
[23] *Commissioner* v. *Fiske's Estate* (CCA 7th 1942), 128 F. 2d 487, 490, cert. den. 317 U. S. 635; *Kastel* v. *Commissioner* (CCA 5th 1943), 136 F. 2d 530, 533; *Commissioner* v. *Swent* (CCA 4th 1946), 155 F. 2d 513, 517, cert. den. 329 U. S. 801.
[24] *Rummel* v. *Peters*, 314 Mass. 504, 51 N. E. 2d 57, 62.
[25] *Davis* v. *Davis*, (Ohio App.), 57 N. E. 2d 703, 705.
[26] Art. 1 of Public Law 195, 80th Congress, approved July 16, 1947.

difficulties will have been magnified unless this Honorable Court reverses this case.[27]

Wherefore, it is respectfully urged that the writ of certiorari be granted.

Respectfully submitted,

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CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,

GEORGE C. UPDEGRAFF,
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[27] Sec. 3, Title VI of the 1947 Act imposes an income tax upon every resident. Sec. 4(s), Title I of said Act defines the word "resident" to mean "every individual domiciled within the District on the last day of the taxable year, and every other individual who maintains a place of abode within the District for more than seven months of the taxable year, whether domiciled in the District or not," with an exception as to Federal officials and employees who are domiciled outside the District prior to the beginning of the taxable year. In the conference report (House Report No. 801, July 7, 1947) the Managers on the Part of the House stated (p. 4) that the latter may, of course, be litigated.

No. 417

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

DISTRICT OF COLUMBIA, *Petitioner*

v.

CLIFFORD G. BECKHAM, MABEL V. BECKHAM, *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO ISSUANCE OF A WRIT OF CERTIORARI.

LESLIE C. GARNETT,
SAMUEL F. BEACH,
Attorneys for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO ISSUANCE OF A WRIT OF CERTIORARI.

Respondents oppose the issuance of a writ of certiorai on the following grounds:

FIRST. This court will not ordinarily review a judgment of the United States Court of Appeals of the District of Columbia, based upon a local statute confined in its operation to the District of Columbia.

SECOND. The sole question involved in this case is the domicile of the respondents and this court will not review the findings as to this fact by the United States Court of Appeals.

THIRD. The judgment of the United States Court of Appeals for the District of Columbia is plainly right that

the finding of the Board of Tax Appeals that the respondents were domiciled in the District of Columbia on December 31, 1940 was "clearly wrong".

ARGUMENT.

1. This court will not reexamine the judgment of the United States Court of Appeals in this case.

Section 2(a) of the D. C. Income Tax Act, 53 Stat. 1087, Chap. 367, D. C. Code 1940, Title 47 Sec. 1502(a) is a local statute confined to the District of Columbia. It has no force and effect outside of the District of Columbia and has no general application. No Federal question is involved in the construction of this statute. The decision of the highest court of the District of Columbia is entitled in such case to the same dignity and conclusiveness as to the judgment of the courts of last resort in the several states.[1]

Only in exceptional cases will this court review a determination of a local question by the United States Court of Appeals for the District of Columbia. The jurisdiction of this court does not extend to cases where the Act of Congress construed by the Court of Appeals for the District of Columbia is purely local, but that jurisdiction extends only to those laws having a general application through the United States.[2]

2. The sole question involved in this case is the domicile of the respondents and this court will not review the findings as to this fact by the United States Court of Appeals.

The quotation in the petition (p. 11) from *District of Columbia* v. *Murphy*, 314 U. S. 440, 455, to the effect that "the question of domicile is a difficult one of fact" pre-

[1] *Busby* v. *Electric Utility Employees Union*, 323 U. S. 72, 77.

[2] *American Security & Trust Co.* v. *District Commissioner*, 224 U. S. 491.

cludes a review here of the findings of fact in the court below.

In *District of Columbia* v. *Pace*,[3] Mr. Justice Jackson, who wrote the earlier opinion in the *Murphy* case, specifically pointed out in his opinion (p. 701), "We did not take this case to determine where Mr. Pace was domiciled", but added that certiorari was granted to determine the scope of the review of the decisions by the Board of Tax Appeals of the District of Columbia. This decision, holding that the United States Court of Appeals had power to review the facts, fully justifies the language of the Court of Appeals in this case (R. 25) as follows:

> "In view of *District of Columbia* v. *Pace*, 320 U. S. 698 (1944), the sole question before us, except that arising from a contention noted below of counsel for the District against the *Collier* decision, is whether or not under the evidence before the Board its finding is clearly wrong."

The court below having determined under the evidence before the Board of Tax Appeals that its finding was "clearly wrong", this court will not review this finding, for as said in the *Pace* case, supra, (p. 703):

> "The Court of Appeals therefore had power to set aside the determination of the Board of Tax Appeals if convinced, as it was, that the Board was clearly wrong. We are not called upon to separate factual from legal grounds of decision and to determine if reversal of the Board of Tax Appeals by the Court of Appeals could stand on questions of law alone. The judgment therefore is affirmed."

This language is conclusive that this court will not review the facts as found by the court below.

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[3] *District of Columbia* v. *Pace*, 320 U. S. 698.

3. The judgment of the United States Court of Appeals is plainly right.

The authorities heretofore cited herein would seem to preclude the reexamination of the judgment below. However, such an examination would show that it is plainly right.

The petitioner attempts to bring this case within the provisions of Rule 38(c) by contending that the United States Court of Appeals has not given proper effect to the decision in the *District of Columbia* v. *Murphy*, supra, and that the decision is in conflict with its prior decisions following that case. It is enough to point out that its decision in this case is in accord with *D. C.* v. *Pace*, supra, which followed the *Murphy* case, where this court specifically said that they did not grant certiorari to determine where the taxpayer was domiciled, but to determine the scope of review of decisions of the Board of Tax Appeals by the Court of Appeals, upholding the power of the court below to determine the facts.

The United States Court of Appeals for the District of Columbia expressly "bottomed" its conclusion that Pace was domiciled in the District of Columbia upon the opinion of this Court in the *Murphy* case. This being true, it can hardly be contended on behalf of the petitioner that the decision in the instant case is in conflict with its prior decisions following the *Murphy* case. It is contended for the petitioner that the *Murphy* case placed the burden of proof upon the taxpayer to establish domicile outside of the District if he is to escape tax (Petition p. 11). This again is a mere matter of proof and a question of the sufficiency of the evidence, a question of fact which this court will not examine into because it raises no question of law.

The court below found the following facts (R. 26):

> "Beckham, a lawyer, came with his wife to the District of Columbia in 1928 from Texas to accept a position in the Bureau of Internal Revenue which he still occupies. He and Mrs. Beckham had previously re-

sided in Fort Worth. In the District the Beckhams have lived in a rented apartment. They own no real estate in the District but have had bank accounts. They own two parcels of real estate in a Forth Worth suburb and a cemetery lot in Fort Worth. They have paid poll taxes in Texas since coming to the District until becoming sixty-five years of age—Beckham's present age. They have voted in Texas at every general election. They have not returned to Texas during their residence in Washington. They have paid all federal income taxes at Dallas, Texas. They have no church membership in Washington, although they occasionally attend church and make small contributions. Their only church membership is in the First Church of Christ, Scientist, in Boston. Beckham has retained membership in fraternal organizations such as the Shrine, the Blue Lodge, the Consistory and the Scottish Rite in Fort Worth. They have contributed to charities in the District and not in Texas. When Beckham retires, which he is now eligible but not compelled to do, he expects to return to Fort Worth. The Beckhams have claimed Fort Worth as their residence ever since they have been in Washington. If Beckham were forced to retire prior to reaching the age of 76, and were offered a position in the District at a like salary, and if the combination of that salary with his retirement pay were enough better than what he could anticipate making in Texas he might take it. If forced out of the Government service at 70 he will go back to practice law at Fort Worth. If he retires at 76 he does not know what he will do."

In the light of these facts, while the husband is under appointment in the Federal service in Washington, he did not establish a permanent place of abode here and abandon their domicile of origin in Texas by merely renting an apartment here.

The language of Mr. Justice Jackson in the *Murphy* case, quoting the chairman of the Senate Conferees, is controlling in this case (p. 450):

"Mr. President, I now call attention to the fact that the individual income tax is imposed only on those

> domiciled in the District of Columbia. It, therefore, necessarily excludes from its imposition all Senators and Members of the House of Representatives, the President of the United States, all Cabinet officers, and Federal employees who have been brought into the District from the various States of the Union to serve their country in the National Capital, provided such employees have not of their volition surrendered their domiciles in the States and have voluntarily acquired domiciles within the District of Columbia."

and again (p. 454):

> "We hold that a man does not acquire a domicile in the District simply by coming here to live for an indefinite period of time while in the Government service. A contrary decision would disregard the statements made on the floor of Congress as to the meaning of the statute, fail to give proper weight to the trend of judicial decisions, with which Congress should be taken to have been cognizant, and result in a wholesale finding of domicile on the part of Government servants quite obviously at variance with congressional policy. Further, Congress did not intend that one living here indefinitely while in the Government service be held domiciled here simply because he does not maintain a domestic establishment at the place he hails from."

Counsel for the petitioner contend that the answer of the taxpayer to hypothetical questions as to what he would do about returning to Texas at the end of his government service evidenced no fixed intention to return to the place of nativity at the end of government service. As to this, the court below rightly said (R. 27) that "these conditional answers to hypothetical questions constitute no substantial evidence that the Beckhams" had not a fixed intention at the end of his government service to return to their previous abode in Texas.

The court below further said:

> "Any honest witness—and no question of the veracity of the Beckhams is here raised—testifying to a fixed intention to return to a former abode at the end

> of Government service would be bound to admit, if questioned, that he *might* remain in the District if at some future time it was made substantially to his advantage to do so; or that if he were to reach an advanced age before his Government service ended, he might not depart. If such speculative answers to hypothetical questions warrant disregard of convincing circumstantial evidence and direct statements as to past and present domiciliary intent, then the rule of the *Collier* case is rendered nugatory. We think such questions and answers insufficient to bar a former domicile in the face of uncontradicted and unequivocal testimony of a fixed intent throughout the period of the Government service in the District to return to the former abode at the end of such service."

The weight of this testimony and the ultimate fact was for the determination of the U. S. Court of Appeals for the District of Columbia, and its finding is conclusive.

The petitioner can find no support in the terms of the District of Columbia Income and Franchise Tax Act of 1947, Art. 1, Public Law 195, 80th Congress, approved July 16, 1947, cited in the petition (p. 19), which specifically provides that the domicile of the government employee for any taxable year shall be in the state which he expressly declares to be the state of his domicile.

The conference report cited for the petitioner (Petition p. 20) evidences that the Senate had undertaken to repeal the existing law and to exempt from income taxes in the District of Columbia only such officers of the government as were appointed by the President and confirmed by the Senate, leaving all government employees who maintained a place of abode within the District for more than seven months subject to an income tax.

Congress refused to pass the Senate provision and enacted a statute which defines "resident" and specifically provides that the bona fide declaration of the taxpayer expressly fixes his domicile. Thus Congress now expressly

exempts from income taxes government employees who bona fide claim their domicile in the states of their origin.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING

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DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United State:

PRELIMINARY STATEMENT

The petitioner in the above entitled cause requests this Honorable Court, pursuant to Rule 33 of the Revised Rules of

this Court, to grant a rehearing on the petition for certiorari, and, upon reconsideration, to grant the petition.

In its petition for certiorari, which was denied November 17, 1947, petitioner urged as reasons for granting the writ that:

1. The United States Court of Appeals for the District of Columbia has not given proper effect to the decision of this Court in the case of *District of Columbia* v. *Murphy*, 314 U. S. 441, 86 L. ed. 329, 62 S. Ct. 303.

2. The Court of Appeals has decided an important question of local law in conflict with its prior decisions following the Murphy case.

THE DECISIONS OF THIS COURT AND THE COURT OF APPEALS

The question involved pertains to the methods of determining a person's domicile for District of Columbia income tax purposes. Mr. Justice Edgerton, in his dissenting opinion, said (R. 27, 28):

> "In *District of Columbia* v. *Murphy*, 314 U. S. 441, the Supreme Court said: 'We hold that persons are domiciled here who live here and have no fixed and definite intent to return and make their homes where they were formerly domiciled. * * * The intention to return must be unconditional. * * * In order to retain his former domicile, one who comes to the District of Columbia to enter Government service must always have a fixed and definite intent to return and take up his home there when separated from the service.' (pp. 454, 455, 456)
>
> "The petitioners live here. The Court ruled in the Murphy case that 'The place where a man lives

is properly taken to be his domicile until facts adduced establish the contrary.' The question therefore is whether the Board was clearly wrong in failing to find that the petitioners had proved that they had a 'fixed and definite,' an 'unconditional,' intent to return to Texas when Clifford G. Beckham is separated from the service.

"I think the Board was right. * * * *According to his own testimony,* therefore, *his intent to return to Texas was conditional* on (1) the age at which he might be separated from the government service and (2) the comparative employment opportunities here and in Texas that he might then find. This testimony was not contradicted." (Emphasis supplied.)

"An intent to return to a former home, subject only to some highly improbable contingency, would doubtless be fixed and definite, rather than conditional, within the meaning of the rule. Perhaps all intents to return are subject to some highly improbable contingencies. But considerations of that sort do not decide this case. An employee's intent to return to his former home when he retires from government service may well be subject *only* to contingencies that clearly appear to be highly improbable. But the intent of Clifford G. Beckham to return to Texas is subject to a contingency that does not clearly appear to be at all improbable. It seems to me a paradox to say that this qualified intent is clearly fixed, definite, and unconditional."

Justice Edgerton undoubtedly was of opinion that the majority decision in the present case was contrary to this Honorable Court's pronouncements in the *Murphy* case, where it was said (314 U. S. 456):

"In order to retain his former domicile, one who comes to the District to enter Government service must *always* have a *fixed* and *definite* intent to return and take up his home there when separated from the service. A mere sentimental attachment will not hold the old domicile. *And residence in the District with a nearly equal readiness to go back where one came from, or to any other community offering advantages upon the termination of service, is not enough.*

"One's testimony with regard to his intention is, of course, to be given full and fair consideration, but is subject to the infirmity of any self-serving declaration, and may frequently lack persuasiveness *or even be contradicted or negatived by other declarations and inconsistent acts.*" (Emphasis supplied.)

This Court further said in footnote 9 of the *Murphy* case (314 U. S. 455):

"* * * While the intention to return must be fixed, the date need not be; while the intention to return must be unconditional, the time may be, and in most cases of necessity is, contingent. * * *"

The Court of Appeals, in deciding this case, has prescribed a *condition* in the determination of domicile when it said (R. 27):

"* * * Any honest witness—and no question of the veracity of the Beckhams is here raised—testifying to a fixed intention to return to a former abode at the

> end of Government service would be bound to admit, if questioned, that he *might* remain in the District if at some future time it was made substantially to his advantage to do so; or that if he were to reach an advanced age before his Government service ended, he might not depart. * * * " (Emphasis *not* supplied.)

The Court of Appeals in holding that an employee in Government service who testifies "that he *might* remain in the District if at some future time it was made substantially to his advantage to do so" is contrary to the plainly expressed requirements of retaining one's domicile at a former place of abode and, if allowed to stand, has the effect of nullifying or overruling the *Murphy* case. Thus the majority decision of the Court of Appeals is of tremendous significance to residents in the District of Columbia and to the officials of the District who are charged with administration of the tax laws and collection of the District's revenues.

REASON FOR REHEARING AND GRANTING THE WRIT OF CERTIORARI

As counsel for petitioner pointed out in their brief in support of petition for certiorari, the conflict between the decision of the Court of Appeals in the present proceeding and its earlier decisions, if the lower Court's decision in the present case is allowed to stand, places residents of the District of Columbia and the District tax officials in a serious quandary. None will know on what basis the domicile of a person residing in the District of Columbia is to be determined for tax purposes. No further reliance can be made upon the pronouncements of this Honorable Court in the *Murphy* case if the present decision of the Court of Appeals becomes final. The bare statement of any person to the effect that he intends to return to the place

of his former abode outside the District of Columbia, without regard to the various relevant indicia of domicile as to where his true home is, would be sufficient to retain a domicile outside the District.

While the Congress, in enacting the District of Columbia Income and Franchise Tax Act of 1947,[1] has provided a means by which Federal officials and employees may escape District of Columbia income tax as to their Federal salaries by the filing of affidavits of domicile outside the District of Columbia,[2] it also recognized that such officials and employees must have had domiciles outside the District immediately prior to the beginning of the taxable year. The Conference Report[3] relating to the specific question under the 1947 Act recognized that the question of domicile raised by any officer or employee of the Federal Government could be litigated. If merely a declaration of intention relieves a Federal employee of individual income tax liability under the 1939 Act, so, it would seem, does the 1947 Act, and the words of the Managers on the part of the House would be meaningless.

In view of the foregoing, the fundamental question presented in the present case is not where the respondents were domiciled during the tax years involved but whether the *Murphy* case decided by this Honorable Court has been overruled by the United States Court of Appeals and consequently what is the test of determining a person's domicile in the District of Columbia.

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[1] Article I of Public Law 195, 80th Congress, approved July 16, 1947.

[2] Section 4(s), Title I, District of Columbia Income and Franchise Tax Act of 1947.

[3] House Report No. 801, July 7, 1947, of the Managers on the part of the House.

It is accordingly respectfully submitted that this Honorable Court should rehear our petition for certiorari and upon such rehearing should issue the writ.

Respectfully submitted,

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CERTIFICATE

I, counsel for the petitioner herein, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

VERNON E. WEST,
Corporation Counsel, D. C.

December 5, 1947